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No. 30-885

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MALLEABLE IRON RANGE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR MALLEABLE IRON RANGE COMPANY

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QUESTION PRESENTED FOR REVIEW

Malleable Iron Range Company, hereinafter referred to as "MIRCo", does not agree with the question as presented by the National Labor Relations Board, hereinafter referred to as "Board"; therefore the following question is presented:

> "Whether the Court of Appeals for the Seventh Circuit erred by finding that the Board did not apply the proper legal standard of *NLRB* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974), relating to a determination of eligibility of employees in a collective bargaining unit; namely, that all confidential employees, and not only those in labor relations, are excluded from the protection of the National Labor Relations Act".

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BRIEF FOR MALLEABLE IRON RANGE COMPANY

OPINIONS BELOW

MIRCo accepts the statement of the Board in this regard.

JURISDICTION

MIRCo accepts the statement of the Board in this regard.

STATUTES INVOLVED

MIRCo accepts the statement of the Board in this regard.

STATEMENT OF THE CASE

MIRCo accepts the Board's "STATEMENT", in "B. Malleable" (Bd. Brief 9-13), with the additions as stated herein.

The Board correctly notes that MIRCo's confidential employee ineligibility contention related to eighteen (18) employees. However, the Court of Appeals below did not address several other issues raised by Respondent; namely, (1) Whether thirteen (13) of the 18 and four (4) other employees should be managerial exclusions from the bargaining unit?; (2) Whether four (4) of the eighteen (18) and another employee should be supervisory exclusions from the bargaining unit?; and, (3) Whether improper legal standards were applied by the Board in determining that time study personnel, research-development engineers and plant clerical employees comprise an appropriate collective bargaining unit together with the office clerical employees?

SUMMARY OF ARGUMENT

The Board's argument that the Labor Management Relations Act, 29 U.S.C. §151 *et seq.*, hereinafter "Act" permits application of the "labor nexus" test for determining the confidential capacity of employees is without merit.

This Court decided in *NLRB* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 85 LRRM 2945

(1974) that the early Board decisions which pre-dated the 1974 amendments to the Act, the legislative history of the Act and subsequent Board and court decisions require the conclusion that Congress intended to impliedly exclude from the protection of the Act employees properly classified as confidential.

This Court in *Bell Aerospace* did not misconstrue, as the Board argues, the legislative history of the Act or *Ford Motor Co.*, 66 NLRB 1317, 17 LRRM 394 (1946) in connection therewith.

Nor do subsequent court of appeal decisions require a revival of the "labor nexus" test for confidential employee determinations.

The judgment of the United States Court of Appeals for the Seventh Circuit in the proceeding below to exclude confidential employees from the protection of the Act without application of the Board's "labor nexus" test is correct and should be enforced.

The appropriate test for determining the confidential exclusionary questions in this Case on remand to the Board will remove from the properly classified confidential employee the onus of deciding which and to what degree loyalties should be compromised as between management and fellow employees.

ARGUMENT

I.

THE BOARD'S "LABOR NEXUS" TEST IS NOT THE PROPER LEGAL STANDARD FOR DETERMINING THE CONFIDENTIAL STATUS OF EMPLOYEES

The cases[1] before the Court in this cause involve the question of whether the Seventh Circuit Court correctly concluded that "all confidential employees, and not only those in labor relations, were excluded from the protection of the Act"; i.e., the Board's limiting "labor nexus" relationship test is not the proper legal standard for determining confidential employees. (Pet. App. 3a, 58a).

The authority for the Seventh Circuit's conclusion is *NLRB* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 85 LRRM 2945 (1974). (Pet. App. 32-4a, 27a-31a, 57a-58a.

The Board advances a number of reasons to support the proposition that the *Bell Aerospace* holding does not require the "rejection of the Board's 'labor nexus' test for determining the status under the Act of confidential nonmanagerial personnel". (Bd. Brief 32-39).

MIRCo disagrees.

The Board contends that *Bell Aerospace* incorrectly interpreted the legislative history of the Act. On the subject, this Court stated as follows:

> "The legislative history of the Taft-Hartley Act of 1947 may be summarized as follows. The House wanted

[1] The *Hendricks County Rural Electric Membership Corporation* companion case is hereinafter referred to as *"Hendricks"*.

to include certain persons within the definition of 'supervisors' such as straw-bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate's view prevailed. There were other persons, however, whom both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of these persons explicit. In the conference agreement, representatives from both the House and the Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in 'labor relations, personnel and employment departments,' and 'confidential employees.' But assuredly this did not exhaust the universe of such excluded persons. The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[m]ost of the people who would qualify as 'confidential employees' are *executives and are excluded from the Act in any event.*' H.R. Rep. No. 245, p. 23 (emphasis added.)[12]

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[12] The Report stated in reference to "confidential employees": "These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. *Most of the people who would qualify as 'confidential employes' are executives and are excluded from the act in any event.*

"The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to people such as these." *Ibid.* (Emphasis added.)

In 1946 in *Ford Motor Co.*, 66 NLRB 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised "managerial" functions in the field of labor relations". The discussion of "confidential employees" in both the House and Confer-

> ence reports, however, unmistakably refers to that term as defined in the House Bill, which was not limited just to those in "labor relations". Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

> We think that the inference is plain that 'managerial employees' were paramount among this impliedly excluded group." [*Bell Aerospace, supra* at 283-284, 85 LRRM 2951].

This analysis, particularly that set forth in footnote 12, was fundamental to the conclusion by the Seventh Circuit that the Board's "labor nexus" test may not appropriately be applied to the questions of whether confidential employees are protected employees undr the Act. (Pet. App. 3a-6a, 27a-31a, 57a-58a).[2]

In view of this Court's clear and explicit interpretation given to the legislative history of the 1947 amendments to

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[2] At least two legal treatises on this exact point support the lower Court's conclusion. Thus, in one of them, the following was stated:

> "The Court examined the legislative history of the 1947 Amendments and held that Congress intended to exclude *all* managerial employees 'from the protections of the Act'. *To reach this holding, the Court also concluded that confidential employees were excluded from the coverage of the Act*". [Keller, Brooks, *NLRB Treatment of Confidential Employees' Renewed Confrontation with Congress and Courts,* 31 Lab. L.J. 733, 738-739 (1980); emphasis supplied].

Also, in a footnote to the conclusion of the Note, *Will The Real Managerial Employees Please Stand Up?,* 9 Loy. L.A.L. Rev. 92 (1975), the following was stated:

> "A final result of the Supreme Court decision (*Bell Aerospace*) which seems clear is that confidential employees are likewise excluded from the protection of the Act. The legislative analysis applied to managerial employees will apply *a fortiori* to confidential employees". [*Ibid.,* 123, n. 180].

the Act, the only way the Board in this cause could regain the "labor nexus" policy for confidential exclusions is for this Court to reverse the recent *Bell Aerospace* analysis of the legislative history.[3]

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[3] Insofar as the Court may engage in another review of the legislative history, MIRCo adopts the able presentation thereof by Counsel for Hendricks in its Reply Brief as supplemented in this footnote. The National Industrial Recovery Act, as part of the Great Depression legislation, was the precursor of the original Act. In this regard, an article entitled "US Government Spinning Out of Control", published in the *Milwaukee Journal*, Sunday, June 14, 1981, Sunday Forum edition, stated as follows:

> "The chief proponents of a strong central government then were business leaders, and they wanted it only strong enough to protect commerce. The poor were thought to be poor because of personal failure. Help for the needy came mostly from family, charity or local government.
>
> But in 1929 the wheels fell off. Suddenly 12 million Americans, one out of four of the country's breadwinners, were looking for jobs that didn't exist. More than 86,000 businesses went under.
>
> In the spreading hunger and deepening humiliation, middle-class neighbors knocked on back doors for handouts. Rioting farmers dumped cans of milk rather than sell it for two cents a quart.
>
> State and city governments were virtually helpless. Private charities dried up. The whole country seemed at a dead stop.
>
> Only the federal government had the resources to help, and under Franklin Roosevelt it did: Federal Emergency Relief. Social Security. Unemployment Compensation. The Civilian Conservation Corps. The National Labor Relations Act. The Securities and Exchange Commission. The Agricultural Adjustment Administration. The Tennessee Valley Authority. The Works Progress Administration". (*Ibid.*, p. 1).

The Board's first year of existence was by authority of Public Resolution No. 44, which was enacted by the 73rd Congress due to the failure of that Congress to enact a comprehensive federal labor law.

(footnote continued)

The Board also argues in its attempt to revive the "labor nexus" test that *Bell Aerospace* misconstrued the decision in *Ford Motor Co.*, 66 NLRB 1317, 17 LRRM 394 (1946), because the Board has consistently applied the "labor nexus" test "to non-managerial confidential employees since the early days of the Wagner Act". (Bd. Brief 33, 35). To the contrary, consider the following remarks from the law review Comment, *Will The Real Managerial Employees Please Stand Up?*:[4]

(footnote continued)
I. *Leg. Hist.* 1255 B. In the 1st Session of the 74th Congress in 1935, S. 1958 and H.R. 6187 were the progenitors of the Act as passed by Congress in 1935. Both bills initially defined "employee" in the same language as that which became the law, and that language remained the same until the 1947 amendments. I. *Leg. Hist.* 1295; II *Leg. Hist.* 2444. As best as can be determined, the only statements and legislative debate on the subject of "employees" related to the concern that discharged and striking employees would retain employee status after the fact. I. *Leg. Hist.* 1342-46; II *Leg. Hist.* 1683, 1688, 1748, 1833-84, 2305-06, 2400 and SENATE REPORT No. 573 on S. 1958. This cursory reference to the pre-1947 legislative history supports a couple of observations. First, the "employee"-"employer" dichtomy was conceived within the context of an extremely depressed economy designed to up-grade the livelihood of the working class of the "plant", which is precisely what Justice Douglas was referring to in his dissent in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 493, 19 LRRM 2397, 2401 (1947). Secondly, Congress' dissatisfaction with the Board's development of the scope of the "employee" definition after the initial enactment of the Act in 1935 moved Congress to amend the Act in 1947.

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[4] The author described the scope of the Comment on the *Bell Aerospace* decision as follows: "The forty-year judicial, administrative, and legislative history leading to this decision, as well as its immediate and potential ramifications upon American labor relations". (*supra*, at 92).

"Intense production in the mid-war years gave rise to a rash of organizing among foremen. This provided fertile ground for litigation of the managerial issue. In 1942, the expression 'closely related to management' became a basis for excluding time study men.[26] By 1943, the term 'managerial function' was used, but usually in conjunction with descriptions of supervisory authority and confidential relationships to management.[27] The terms confidential, managerial and supervisory were frequently used interchangeably and the concomitant confusion persists to this day.[28] The year 1944 was a banner year for 'managerial' proliferation. In January, assistant buyers who possessed no authority to hire, fire, or discipline were excluded from employee units as supervisors because their 'interests —[were] identified with management'.[29] February witnessed managerial exclusions for executives who 'deal with matters relating to labor relations and determine labor relations policy',[30] and for buyers and expediters because of the higher degree of skill and responsibility entailed in their jobs.[31] March provided a distinction between confidential employees and buyers closely allied with management.[32] In April, the Board actually used the term 'managerial' twice to exclude those who could commit the employer's credit.[33] Yet in October, the Board considered the same trait an indicator of supervisory status without mentioning the term 'managerial'.[34]

Throughout 1945 and 1946, the use of the term 'managerial' in conjunction with those of 'supervisory', 'confidential', and 'administrative' continued and the attendant connotations mushroomed.[35] Finally, in *Ford Motor Co.*[36] the Board attempted to distinguish among the terms and defined managerial employees as

> executive employees who are in a position to formulate, determine, and effectuate management policies. These employees we have considered and still deem to be 'managerial', in that they express and make operative the decisions of management.[37]

Such categories as supervisors,[38] and others,[39] were to be excluded from units of rank and file employees.

> Confidential employees were confined to the limtied classification of 'those employees who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations'.[40]'' (*Ibid.*, 95-97; footnotes omitted).

With respect to whether confidential and managerial employees were considered by the Board as protected to organize under §2(3) of the Act during the period prior to the 1947 amendments, this Comment concluded that their status "was uncertain". (*Ibid.*, 98). Such studied conclusions are greatly at odds with the Board's contention on this point.

The Board also argues that the narrow "labor nexus" exclusionary policy should apply to the determination of the confidential classification because the courts of appeals, with only the exception of the Seventh Circuit Court below, have approved the application of that policy. (Bd. Brief 31-32).

An analysis of the cases upon which this assertion is based establishes that there is no strength to it.

Thus, the decision in *Union Oil Co. of California, Inc.* v. *NLRB*, 607 F. 2d 852, 102 LRRM 2673 (CA-9, 1979) may be read to support the proposition that the Court did not rule that the "labor nexus" test was an indispensable element for determining confidential status. Thus, the Ninth Circuit Court considered, but rejected on the basis of an insufficient record, the employer's reliance on *CF & I Steel Corporation*, 196 NLRB No. 69, 80 LRRM 1063 (1972), in which case the Board excluded as confidential employees a program-tester, a librarian for the computer tapes and a secretary on the basis that the employees regularly worked with systems considered confidential by management, the implementation of which would affect other employees. As such, *Union Oil* does not conflict with *Bell*

Aerospace. The decision in *NLRB* v. *Los Angeles New Hospital,* 640 F. 2d 1017, 106 LRRM 2855 (CA-9, 1981), may also be read in accord with *Bell Aerospace.* At issue in *Los Angeles New Hospital* was an allegation that the employer unlawfully interrogated an employee, which issue depended on the question of whether that employee had a confidential capacity. The Ninth Circuit enforced the Board's conclusion that the individual was not a confidential employee. In doing so, the Ninth Circuit noted that it was unnecessary to "reach the labor nexus question * * *". (640 F. 2d at 1023, 106 LRRM at 2859). Moreover, insofar as *Union Oil* relies on *Westinghouse Electric Corporation* v. *NLRB,* 398 F. 2d 669, 68 LRRM 2849 (CA-6, 1968), the Ninth Circuit decision is misplaced. The *Westinghouse Electric* case predates *Bell Aerospace* and was litigated within the framework of the Board's "labor nexus" exclusionary policy, which *Bell Aerospace* rejected.[5] The same applies to *NLRB* v. *Allied Products Corporation,* 548 F. 2d 644, 94 LRRM 2433 (CA-6, 1977). The Board's reliance on *NLRB* v. *Hoerner-Waldorf Corporation,* 548 F. 2d 644, 90 LRRM 3118 (CA-8, 1975), is misplaced, since the Eighth Circuit Court disposed of the case on a supervisory issue and only summarily dealt with an issue relating to the confidential status of two employees. Likewise, *NLRB* v. *California Inspection Rating Bureau,* 591 F. 2d 56, 100 LRRM 2938 (CA-9, 1979) dealt with only the jurisdictional issue relating to a political subdivision of the State and, therefore, has nothing to do with court of appeal approval

[5] Thus, the Sixth Circuit Court stated that the sole issue was whether the department managers for whom the three secretaries in question worked, whom the employer claimed as confidential, "formulated, determined, or effectuated management policies in the field of labor relations". (398 F. 2d at 671, 68 LRRM at 2851). The Court deferred to the Board's judgment that the department managers did not possess such authority; therefore, the secretaries were not confidential.

of the "labor nexus" test. Lastly, both *NLRB* v. *Service Technology Corporation*, 480 F. 2d 923, 83 LRRM 2701 (CA-5, 1973) and *NLRB* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690, 53 LRRM 2519 (CA-4, 1963) predate *Bell Aerospace*, and, therefore, contribute nothing to the Board's argument.

In its entirety, therefore, the Board's attempt to regain its narrow "labor nexus" exclusionary policy must fail.[6]

II.

THE PROPER LEGAL STANDARD FOR DETERMINING CONFIDENTIAL STATUS

The Court below, in an unpublished Order, concluded that the review of the Board's decision relating to MIRCo's claim that "at least 18 of its employees should be excluded from the unit because they have access to confidential information and are therefore confidential"[7] was "frustrated by the failure of the Board to adhere to the law", as the lower Court had interpreted it in *Hendricks;* therefore, the proceedings were ordered remanded to the Board "for further consideration consistent with this order and with the *Hendricks* case". (Jt. App. 56a-61a).

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[6] Consider, in this regard, that the Board had no difficulty in excluding estimating department employees from participation in a representation election because of their confidential status, notwithstanding that the employees did not possess a "confidential work relationship with a specifically identifiable managerial employee responsible for labor policy". *Pullman Standard Division of Pullman Incorporated*, 214 NLRB 762, 763, 87 LRRM 1370, 1371 (1974).

[7] It is noted again that MIRCo also contends that 13 of these 18 employees are also managerial exclusions and that 4 of them, in addition to another employer, are also supervisory exclusions. These and additional bargaining unit issues were not considered and/or determined by the court of appeals below. (See, *supra*, p. 2; Bd. Brief 40 n. 47).

MIRCo maintains that the judgment of the Seventh Circuit is correct and should be enforced.

The appropriate test to be applied on remand is whether the employee is in possession of the type of business information which aligns the employee with management, because it is of a highly confidential nature that is not available to either the public, or to competitors, or to other employees, so that the employee must be excluded protection of the Act to avoid the potential conflict of interest between management and fellow employees.

This test is consistent with the legislative history of the 1947 amendments to the Act [8] and *Bell Aerospace*.[9]

It does no more than to allow management the undivided loyalty of employees having such a sensitive position and thereby eliminates potential impairment of its business. In this way, the test strikes an equitable balance, required by law, between the right of management to manage with a management team unencumbered by a potential break-down in loyalties and the right of the so-called white-collared employees to unionize for collective bargaining purposes with that management. In accomplishing this, and this is significant, it removes from that confidential empolyee, who would otherwise be in a collective bargaining unit by operation of the "labor nexus" test,

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[8] See, House Report No. 245 on H.R. 3020, 80th Cong. 1st Sess. (1947), at 16. (I *Leg. Hist.* of the NLRA at 307).

[9] See, in this regard, the "allied with management" standard emphasized by the Board in *Swift & Co.*, 115 NLRB 752, 37 LRRM 1391 (1956) and the citation therein of 93 Cong. Rec. 6442 (1947) as authority, which related to the "occupational groups" that the Senate did not include in the definition of supervisor and which became the language on the subject in H.R. Conf. Rep. No. 510. The alignment factor is substantially different than the narrower "labor nexus" test, because a work relationship to a managerial employee in labor relations is not required.

the onus of determining which and to what degree loyalties should be compromised and places that determination where it should be—the administration and implementation of the federal labor law.

Application of the test to the individuals in issue in this Case measures each as a confidential employee.[10]

An important consideration to this contention is the fact that MIRCo is engaged in an extremely competitive business. (Jt. App. 34, 40, 67). As a result, customer/distributor lists, costs and pricing data are sensitive and highly confidential business information. (Jt. App. 34, 38-40). Similarly, product design and development information is

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[10] Thus, the technical service employees, namely Kaiser, Heidmann, Murphy, Nagarka, Herbst, Lehmann and Kostolni, have access to confidential information in the form of manufacturing costs and product development. (Jt. App. 36, 37, 52). The secretary to the Industrial Sales Manager, Oelke, has access to and works with cost information that relates to the extremely competitive jobbing business. (Jt. App. 34, 66-67). Pfingsten, the inside salesman, has access to and works with customers lists. (Jt. App. 38, 57-58). The assistant service managers for the Distribution-Traffic-Product Service Department, namely, Kuzniewicz, Holloway and Schmitt, have access to financial information relating to shipments, and, with the exception of Holloway, have access to and work with the confidential distributor/dealership lists. (Jt. App. 58-59). The assistant manager in the Cost Department, Soldner, has extensive work responsibilities with financial data, such as costs, prices, percentage mark-up, sales, and profits, which is highly confidential. (Jt. App. 49-51). The assistant manager in the Computer Service Department, Wendlandt, and a computer operator, Anderson, have access to and work with confidential financial and production reports. (Jt. App. 42, 45-49, 69-70). The assistant manager in the Credit Department, Krause, has access to and responsibly works with the confidential accounts receivables. (Jt. App. 61, 73-74). Schwantes, the assistant bookkeeper, responsibly works with the confidential accounts payables and other financial records relating to cash receipts. (Jt. App. 59, 74).

highly confidential. (Jt. App. 33, 36-37). Also significant to the application of this test is the fact that MIRCo's managerial hierarchy, or "management team", is not extensive; therefore, corporate reliance on individuals, who possess and responsibly work with highly confidential business information, is more diffused. (Jt. App. 37, 75-80).

Notwithstanding, it is anticipated that this Court will not review, analyze and determine the substantive merits of the confidential status issue as to each employee, but, instead, will remand the case for further proceedings consistent with the Court's decision on the legal issue involving the interpretation of the Act.

CONCLUSION

For the reasons hereinbefore stated, MIRCo requests that the decision of the Court of Appeals for the Seventh Circuit be affirmed by this Court.

However, should the Court disagree with the decision of the Seventh Circuit, this Court should not direct enforcement of the Board's order or remand to the Court of Appeals for enforcement, as is requested by the Board, because there are undecided issues raised by MIRCo that must yet be decided by the Court of Appeals below.

Respectfully submitted,

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